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From the Greek Case to the Present: 50 Years of Article 3 of the European Convention on Human Rights

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How to cite:

Graffin, Neil (2020). From the Greek Case to the Present: 50 Years of Article 3 of the European Convention on Human Rights. In: Claydon, Lisa; Derry, Caroline and Ajevski, Marjan eds. Law in Motion: 50 years of Legal Change. The Open University Law School, pp. 52–66.

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Chapter 4

From the Greek Case to the Present: 50 Years of Article 3 of the European Convention on Human Rights

Neil Graffin

Abstract

This chapter will look at the development of Article 3 of the European Convention on Human Rights, which concerns the prohibition of torture and inhuman and degrading treatment or punishment, from the first finding that it had been breached in 1969 in the Greek case, to the current time. It will focus on how the Article came to be treated as prohibiting different categories of harm in the Greek case and *Ireland v UK*, of torture, inhuman treatment or punishment, or degrading treatment or punishment. It will assess when the European Court has been willing to find a breach of the provision, with respect of these categorisations over a 50-year period. The chapter will argue that the Court has been willing to find the provision breached in a wide range of cases, beyond much more than what one imagines its drafters had envisaged. At the same time, the Court has sought to set parameters for the reach of the Article. This chapter will finish by considering some of the potentialities for Article 3 by considering the plight of migrants trying to make their way to Europe, while recognising its failures to protect these people.

1. Introduction

Article 3 of the European Convention on Human Rights (ECHR) states:

‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.¹

Applying to all human beings, it has been said to be absolute – that is, it cannot be derogated from, qualified or limited in any way.² The brevity and *prima facie* simplicity of the text of the Article belie its complexity. In the *Greek case*,³ where a violation of Article 3 was found for the first time, the Article was understood as encompassing different component parts, all of which are defined, and conceptually limited by the practice of the Court. In the seminal case of *Tyrer v United Kingdom*⁴ the European Court of Human Rights (‘the European Court’) stated that the ECHR was a ‘living instrument which... must be interpreted in light of present-day conditions’.⁵ The mission of the human rights programme is embodied within this statement. Human rights should respond to social change but do so in a way which is progressively moving towards better protection. Although we may be living in times which regrettably have

¹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

² DJ Harris, M O’Boyle, E Bates, C Buckley, *Law of the European Convention on Human Rights* (OUP 2018) 237.

³ *The Greek Case*, Report of 5 November 1969, (1969) 12 *Yearbook of the European Convention on Human Rights* 186.

⁴ *Tyrer v United Kingdom* (1978) 2 EHRR 1.

⁵ *Ibid*, para 31.

witnessed the regression of human rights standards with regards to, for example, responding to terrorism, migration or economic inequality, the aspirational nature of the human rights programme has been evident in the case law of Article 3 of the Convention, even if sometimes it falls short.

It would be difficult to argue that the Article has been applied in anything other than a wider range of forms of ill-treatment, with applications in fields including within crime prevention, asylum cases, extradition, police interviewing, corporal punishment, penal environments, *amongst others*. It may also have been applied to much lesser forms of ill-treatment than was originally envisaged. Yet the last 50 years have shown it cannot protect everyone from harmful ill-treatment by the state. The provision has its limitations, and the Court has set parameters as to when the prohibition applies or not. The aim of this review article is to survey 50 years of Article 3, from the *Greek case* in 1969, through to 2019. In doing so, it will look at the drafting of Article 3, early cases before the Commission and Court, as well as some key areas where we can see the development of the case law of the provision. It will spend some time looking at the early seminal cases of the Court – the *Greek case* and *Ireland v UK*,⁶ and it will also assess the recent revised judgment of *Ireland v UK*.⁷ It will consider the definitions of ‘torture’, ‘inhuman treatment or punishment’ and ‘degrading treatment or punishment’, with additional attention paid to the line between acceptable and unacceptable harms committed against persons. It will examine how the concept of human dignity has been used to expand the ambit of the prohibition and argue, contrary to the view of theorists who consider ‘dignity’ to be too intangible to form the basis of legal obligation, that it is a concept with aspirational qualities which has use for modern jurists. The last section regarding how Article 3 has been applied with regards to migration allows a short exploration of the limits of the Article, as well as its potentialities. Given the potential breadth of a review article on 50 years of Article 3, it should be noted from the outset that this cannot be a comprehensive exploration. This is too short a publication to give this study justice, and some important cases may be omitted from discussion. Nevertheless, the cases included have been carefully chosen to trace the development and shaping of Article 3.

2. The Early Judgments – the *Greek Case* and *Ireland v UK*

The drafting of Article 3 ECHR appeared not to provoke controversy, but there was little light shed on how the provision was to be used, and no indication given to what it would become. Before arriving at the final wording of the Article, several different suggestions were made, including by the UK delegate, Seymour Cocks, who argued that the provision should mention mutilation, sterilisation, beating, torture, as well as imprisonment with excess of light, darkness, noise as to cause mental suffering.⁸ Although not adopted, these suggestions help to inform our understanding of the range of harms Article 3 was originally intended to encompass.

The final text which was adopted was very similar to that within the Universal Declaration of Human Rights (UDHR), but there is no indication from the *travaux préparatoires* as to whether they had considered the suitability of the terms ‘torture’ ‘inhuman’ and ‘degrading’ within the provision, or what they meant. The UDHR text itself was passed without unanimous agreement on the inclusion of the terms ‘inhuman’ or ‘degrading’, and with no guidance as to their scope or applicability. The UK delegate to the drafting of the instrument, for example, found the term ‘inhuman’ to be too subjective.⁹ In addition, the UDHR was never supposed to be a source of legal obligation. Later, during the drafting of Article 7 of the International

⁶ *Ireland v UK* (1978) 2 EHRR 25.

⁷ *Ireland v United Kingdom*, Application no 5310/71, Judgment (revision) of 20 March 2018.

⁸ European Consultative Assembly Deb., 1st Session (Part II) 596 (Sept 8, 1949); Klayman, ‘The Definition of Torture in International Law’ (1978) 51 *Temple L Q* 472.

⁹ E/CN.4/AC.1/SR.30.

Covenant on Civil and Political Rights 1966 (ICCPR)¹⁰ delegates also expressed misgivings about the content of the wording of the prohibition and spoke of the need for greater specificity.¹¹ In particular, the word 'degrading' was deemed to be vague.¹²

It seems unlikely that the architects of Article 3 would have been aware that the provision would be held applicable in such a broad range of circumstances. However, divining the original intention of the drafters of the Article is insufficient for a proper understanding of its meaning in contemporary international human rights law, as human rights protections are conceived as living instruments. Focusing on the purpose of the drafters wrongly assumes that drafters have clearly defined ideas of all the intentions and potential interpretations of a provision. We know that is not the case.¹³ Article 3, thankfully, has developed to encompass a wide-range of circumstances, providing protection from many forms of harm. In common with the other provisions in the ECHR, the evolving case law of the European Court has informed our understanding of what Article 3 is meant to prohibit. Given a relatively blank canvas to develop Article 3, the early cases have been particularly influential in shaping how the Article is applied by the Court.

The first breach of Article 3 was found by the European Commission in 1969. In the Spring of that year a military *coup d'état* brought Colonel George Papadopoulos to power in Greece. Throughout the next seven years Greece was subject to military rule and the security forces used torture extensively. Amnesty International conducted investigations into reports of torture which led to the governments of the Netherlands, Sweden and Denmark to claim violations of seven separate Articles of the ECHR, including Article 3, against the Greek state. In the *Greek* case, it was reported that a large variety of methods of torture had been used, including *falanga*,¹⁴ sexual abuse, near suffocation, *strappado*,¹⁵ beating with sandbags or knotted wires, jumping on the stomach, pulling of hair, extraction of finger and toe nails, burning, and electric shocks. It was not surprising in this case that a breach of Article 3 was found. In finding a breach, the European Commission introduced what would become the core constituents in our understanding of Article 3. Since this case, Article 3 has been understood to split into different parts, with a hierarchical progression between torture, inhuman treatment or punishment and degrading treatment or punishment (although this may not be borne out in practice with regards to degradation, as described in the section below):

The word 'torture' is often used to describe inhuman treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment and is generally an aggravated form of inhuman and degrading treatment.¹⁶

The view that torture was inhuman treatment with a purpose was subsequently amended in *Ireland v UK* (1978), another early seminal case in developing our understanding of the provision. During the period known as The Troubles in Northern Ireland, the UK government arrested hundreds of men as part of Operation Demetrius in 1971. Of these, fourteen men were taken to an additional interrogation centre and were subjected to ill-treatment by the security forces. Five techniques were used against the individuals, including making them

¹⁰ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999 171.

¹¹ Klayman 'The Definition of Torture in International Law' 462.

¹² E/CN.4/SR.141, 3.

¹³ For more on issues such as this see: M Davies, *Law Unlimited* (Routledge 2017) 46.

¹⁴ Repeated action of blunt trauma to the feet.

¹⁵ The victim's hands are tied behind his or her back and suspended by a rope.

¹⁶ The *Greek* case.

stand in stress positions,¹⁷ placing hoods over their heads (they became known thereafter as the 'hooded men'), subjecting them to loud noise, depriving them of sleep, and depriving them of food and drink.¹⁸ In this case it was found that the five techniques amounted to inhuman treatment. In doing so, the Court disregarded the distinction made in the *Greek* case that torture was inhuman treatment with a purpose and argued that it was severity of suffering which was the distinction between torture and inhuman treatment. Following this case, it would be considered by many that there was a hierarchical progression of severity of suffering within Article 3 of the Convention with torture at the top of the hierarchy and degrading treatment at the bottom.¹⁹

'...it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering'.²⁰

Recently, scholars have called into question the notion of a hierarchical progression of severity of suffering. Mavronicola argues, 'the terms 'inhuman' and 'degrading' encompass acts with distinct qualities, with potentially distinct effects on the victim',²¹ therefore arguing that degradation is a different form of ill-treatment to inhuman treatment rather than one separated by severity of suffering. Similarly, Webster argues that 'Article 3 is constituted by forms of harm that are connected yet distinctive. They are connected because they make up one holistic legal standard and presumably share some common conceptual ground, and they are distinctive because the text of the Convention uses several terms within this single right...'²² This indicates that the different constituent parts of Article 3 have different conceptual meanings, rather than being strictly separated by severity of suffering. Under this view, it may be the case, for example, that we might find something which is degrading to engender greater suffering than something which is found to be inhuman treatment. Given that suffering is subjective, it would seem difficult to argue that all degrading treatment, for example, causes less severe suffering than inhuman treatment. We may find cases where we could imagine that this does not hold up to scrutiny. We can also see certain concepts used frequently to describe specific types of ill-treatment. For example, surveying cases of the Court, it can be observed that detention conditions are always held to be degrading treatment, inhuman treatment, or inhuman or degrading treatment, but never torture.²³ Nevertheless, it does appear *prima facie* that severity of suffering still has its place in distinguishing between the different concepts – degradation still often appears as a gateway into the provision, and torture describes what we might imagine to be the most severe types of suffering.

The *Ireland v UK* case was widely criticised due to the narrowness of the interpretation of what constituted torture.²⁴ It was felt that the five techniques were torture, and not inhuman and degrading treatment. Possibly the European Court may have been responding to the situation in Northern Ireland where a state of emergency had been declared, and the decision was a political one. The case was re-opened in 2018 to reconsider whether torture had taken place.²⁵

¹⁷ The men were described as having to stand 'spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the finger'.

¹⁸ The *Greek* case, para 96.

¹⁹ M Evans and R Morgan, *Preventing Torture* (OUP 2001) 289.

²⁰ *Ibid*, para 167.

²¹ N Mavronicola 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context' (2015) 15 *Human Rights Law Review* 721, 725.

²² E. Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law* (Routledge 2018), 21.

²³ Harris et al, *Law of the European Convention on Human Rights* 261.

²⁴ M O'Boyle, 'Torture and Emergency Powers Under the European Convention on Human Rights: *Ireland v United Kingdom*' (1977) 71 *American Journal of International Law* 674, 684-88.

²⁵ *Ireland v United Kingdom*, Application no 5310/71, Judgment (revision) of 20 March 2018.

It is worth considering this recent case as in some famous examples the narrow interpretation of torture held in *Ireland v UK* has been used to justify the ill-treatment of detainees. For example, this happened in Israel under the Landau Commission,²⁶ or in the United States (and Guantanamo Bay) through the Bybee Memorandum.²⁷ In the revised judgment, the Court decided not to revisit their decision. However, this was not on the basis that it considered that the five techniques did not amount to torture. Rather a decision to revise a case is based on a technical process undertaken pursuant to Rule 80 of the Rules of that Court. This allows reconsideration of a judgment should new facts emerge which *would have had* a decisive influence on the Court. The focus under the review procedure was not whether the five techniques could be viewed to be torture nowadays. The review procedure seeks to ascertain whether the Court in 1978, when the judgment was made, would have decided the case differently and held the treatment to be torture if they had the documents which have recently been uncovered. The Court in the revised judgment did not consider that the emergence of the documents would have had a decisive influence on the Court's findings and therefore dismissed the case.²⁸

If the decision by the Irish government to apply to revisit *Ireland v UK* had the aim of righting an historic wrong, it was ill-conceived. First, if we consider the influence that the case had in Israel and the US, there were a multitude of arguments presented by both the Landau Commission and in the Bybee memorandum, many of which were considered by the human rights commentariat as entirely wrong, illegal, or politically motivated. The inclusion of the judgment in *Ireland v UK* was presented as only one of several (sometimes perverse) reasonings for permitting ill-treatment. Second, a revision request under Rule 80 is not an opportunity to fix the Court's past mistakes but is a technical process which allows a case to be reconsidered should new *decisively influential* evidence be presented. As the Court stated it is '...not for the Court... to apply retrospectively Article 3 case-law on what is now considered to constitute torture'.²⁹ Should the Court do that, apart from breaching its own rules, it would lead to uncertainty and could add to the increasing backlog of cases for the already overburdened Court.³⁰ Although *Ireland v UK* is an influential case, if we consider that there have been 2404 breaches under the substantive head of Article 3 from 1959 to the time of the writing of this article, we could see the potential for chaos.³¹

Third, the European Court had already decided that the decision in *Ireland v UK* would not hold up, considering that the case included an overly narrow interpretation of torture when it was decided. In the case of *Selmouni v France*³² the applicant was beaten in police custody, called on to perform oral sex on a police officer, and when he refused to do so, had been urinated upon and threatened with a blow torch and a syringe. The Court, dismissing the Government's argument that the ill-treatment did not amount to torture, which relied on the fact that the judgment of *Ireland v UK*, stated that 'certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future'.³³ This case is quoted in the revised *Ireland* judgment, where it additionally states that the case-law on the notion of torture has evolved.³⁴ Should the same facts come before the Court nowadays there undoubtedly would be a finding of torture. The jurisprudence

²⁶ B'TSelem, 'Legislation Allowing the Use of Physical and Mental Coercion in Interrogations by the General Security Service' (2000), available at: <www.btselem.org> accessed 10 July 2019.

²⁷ August 1st, 2002 Department of Justice Memorandum Regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340 – 2340A Assistant Attorney-General for the Office of Legal Counsel at the US Department of Justice, Jay S. Bybee, to Alberto Gonzales, Counsel to the President of the United States.

²⁸ *Ibid*, para 137.

²⁹ *Ireland v United Kingdom*, Application no 5310/71, Judgment (revision) of 20 March 2018, para 10.

³⁰ Council of Europe, *European Court of Human Rights Annual Report 2018*, (COE 2018) 13.

³¹ *Ibid*, 179.

³² *Selmouni v France* (2000) 29 EHRR 403.

³³ *Ibid*, para 101.

³⁴ *Ireland v United Kingdom*, Application no 5310/71, Judgment (revision) of 20 March 2018, para 60.

of the Court had already evolved, as indicated in the case of *Selmouni*, demonstrating the progressively shifting reach of the prohibition, thereby not necessitating that the case should be revisited.

3. Torture

It took the European Court until *Aksoy v Turkey* in 1996 to find a state had committed torture.³⁵ In this case, the applicant's arms were paralysed after he had been stripped naked and suspended by his arms, which had been tied behind his back. Since 1996, 152 further breaches of Article 3 amounting to torture have been found. Given the fact that all findings of torture have been made in the last 23 years, this might show a greater willingness of the Court to find torture has taken place, as opposed to a lesser finding such as inhuman treatment. This may be correct, although it is notable that the Russian Federation – who have been found to have tortured in 63 cases – did not ratify the ECHR until 1998. Further analysis of the cases may be required to ascertain whether the line between inhuman treatment and torture has moved, so that acts previously considered to fall under the former heading are now considered to amount to torture.

Torture has been found in a variety of contexts, mostly in cases where multiple types of ill-treatment have been inflicted to the applicants. For example, a regime of solitary confinement and severe abuse can amount to torture. In the case of *Ilaşcu and Others v Moldova and Russia*,³⁶ the applicant was savagely beaten in a Russian prison. He was threatened with death, denied food for two days, and light for three. The applicant was also subjected to four mock executions. In this case, the Court found that there was a breach of Article 3 amounting to torture. However, in an early torture case, in 1997, it was found in *Aydin v Turkey*³⁷ that a single act of rape can constitute torture.

The Court has also held that the infliction of mental suffering can form part of a claim of a breach of Article 3, but to date has not found that mental suffering on its own amounts to torture.³⁸ This may seem surprising given the aims and effects of some types of mental harm illegally inflicted on individuals. For example, the deprivation or bombardment of noise and light to the senses, for example, has been known to cause aggression, anxiety, stress and hallucinations increasing the risk of heart disease or attack,³⁹ yet there is no judgment which says on its own that this amounts to torture. It may be the case that the European Court does not view these types of behaviours to be sufficiently severe to amount to torture. On the other hand, cases where one method aimed at inducing mental suffering has been used on its own are a rarity, so it may be that the Court has not had the chance to pronounce judgment on the form of ill-treatment. This is a limitation of Article 3, and of human rights courts (and courts) in general – they principally work on a reactive basis where they can only pronounce judgments on the infringement of laws when cases are before them (although persuasive comments can be made *obiter*). The Court, for example, has not had to adjudicate upon a case where sensory deprivation is the only factor under consideration. Therefore, for human rights jurists trying to ascertain what might fall under each heading, it can be part guesswork and part analyses of cases where one attempts to imagine comparable levels of harm, suffering or wrongdoing.

³⁵ *Aksoy v Turkey* (1997) 23 EHRR 553.

³⁶ *Ilaşcu and Others v Moldova and Russia* (2005) 40 EHRR 46.

³⁷ *Aydin v Turkey* (1997) 25 EHRR 251.

³⁸ Harris, M O'Boyle, E Bates and C Buckley, *Law of the European Convention on Human Rights* (Oxford 2009) 75.

³⁹ J Mendelson, P Kubzansky, PH Leiderman, D Wexler, C DuToit and P Solomon, 'Catecholamine Excretion and Behaviour During Sensory Deprivation' (1960) 2(2) *AMA Arch Gen Psychiatry* 147; Z J Lipowski, 'Sensory and Information Inputs Overload: Behavioural Effects' (1975) 16 *Comprehensive Psychiatry* 199; Physicians for Human Rights and Human Rights First, *Leave No Marks: Enhanced Interrogation Techniques* (Physicians for Human Rights and Human Rights First, 2007).

4. Inhuman Treatment or Punishment

For ill-treatment to be 'inhuman' it must 'attain a minimum level of severity'.⁴⁰ The category of 'inhuman treatment or punishment' has not found itself to be subject of conceptual deliberation in the same way that, for example, degrading treatment or punishment has. Evans and Morgan discuss inhuman treatment as a 'residual category'⁴¹ – somewhere between torture and degrading treatment with no formal characteristics of its own. It is differentiated from torture by the severity of suffering of an individual. One can ascertain the parameters of both inhuman treatment and punishment by looking at the practice of the Court. Often a finding of 'inhuman and degrading' treatment may be found, or a finding of 'inhuman treatment' may be found on its own. The Court does not indicate why it has found that degradation is a component in a finding of 'inhuman and degrading' treatment.

In the 50 years since the *Greek* case, a wide-ranging amount of cases have been held to amount to inhuman treatment. Unlike torture, mental suffering on its own has been found to amount to inhuman treatment.⁴² Some notable cases include *Jalloh v Germany*⁴³ where it was held that the insertion of a tube into a person's throat, as well as the administering of an emetic fluid, to force that person to vomit a suspected package of drugs amounted to a breach of Article 3. In *Selçuk and Asker v Turkey*,⁴⁴ there was inhuman treatment when, as part of a security operation, an elderly person's home was destroyed in their presence without regard to their safety, livelihood or shelter. In *Gäfgen v Germany*⁴⁵ there was inhuman treatment when the applicant was threatened with 'intolerable pain' unless he revealed the whereabouts of a kidnapped boy. The concept of 'inhuman punishment' is otherwise relatively underdeveloped. Often the Court will find 'inhuman treatment and punishment' but there is no clear indication given as to why that might be the case.⁴⁶ Cases involving corporal punishment usually are considered to amount to degrading punishment, but often do not reach the threshold to be 'inhuman'.⁴⁷

5. Degrading Treatment and Punishment

Treatment is degrading if it 'is such as to arouse in the victims, feelings of fear, anguish and inferiority capable of humiliating and debasing them'.⁴⁸ The Court has also said of degrading treatment that it 'humiliates or debases an individual, showing a lack of respect for, or diminishing, their human dignity, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.⁴⁹ The assessment of what constitutes degradation, like breaches of Article 3 in general, is relative – it depends on the circumstances of the case.⁵⁰ Degradation is a slippery concept, and the general relativeness of the provision has the potential to call into question the absoluteness of Article 3 (this will be discussed below).⁵¹

⁴⁰ *Ireland v UK* (1979) 2 EHRR 25, para 16.

⁴¹ Evans and Morgan, *Preventing Torture*, 93.

⁴² *Selçuk and Asker v Turkey* (1996) 26 EHRR 477.

⁴³ *Jalloh v Germany* (2007) 44 EHRR 32.

⁴⁴ *Selçuk and Asker v Turkey* 1998-II; 26 EHRR 477.

⁴⁵ *Gäfgen v Germany*, (2010) 52 EHRR 1.

⁴⁶ Harris et al, *Law of the European Convention on Human Rights* 91.

⁴⁷ Evans and Morgan, *Preventing Torture* 93.

⁴⁸ *Ireland v UK* (1979) 2 EHRR 25, para 167.

⁴⁹ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgment of 21 January 2011.

⁵⁰ *Ireland v UK* (1979) 2 EHRR 25, para 167.

⁵¹ For further discussion see: S Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law? A Reply to Graffin and Mavronicola' (2018) 18 *Human Rights Law Review* 297; N Graffin, 'Gäfgen v Germany: The Use of Threats and the Punishment of Those Who Ill-treat During Police Questioning: A

Many of the early cases concerned degrading punishment, as opposed to treatment. For example, in *Tyrer v UK*⁵² the Court held that a sentence of three strokes of the birch to a juvenile, to be conducted publicly, was degrading punishment. The Court found in *Costello-Roberts v UK*⁵³ that a 7-year-old boy being, in private, whacked on the bottom, over his trousers, with a shoe did not amount to degrading punishment. Degrading treatment has been found in cases conditions to detention, including, for example poor sanitary conditions, overcrowding, and small cells,⁵⁴ a lack or refusal of medical treatment,⁵⁵ severe solitary confinement regimes,⁵⁶ and in the use of handcuffs or other restraints.⁵⁷ As I have argued elsewhere,⁵⁸ there are a variety of moral and policy-based reasons why we allow ill-treatment to happen to individuals in specific circumstances.⁵⁹ The line between what is acceptable and unacceptable not only relies on whether ill-treatment can be considered to fulfil the definition of degradation, but whether ill-treatment is deemed acceptable or not given the circumstances of its use. For example, ill-treatment known to cause significant mental health problems, like solitary confinement, has not been considered to reach the threshold of Article 3 unless there are aggravating factors,⁶⁰ even though it is known to be ‘characterised by severe confusional, paranoid and hallucinatory features, and by intense agitation and random, impulsive, often self-directed violence’.⁶¹

The suffering of individuals is difficult to quantify, and so arguing that a specific case provides an example of the widening of the provision leaves one open to criticism for making arbitrary comparisons which fail to consider the subjective experiences of ill-treatment. Nevertheless, it might *appear* that the scope is widening (this can be viewed in some cases which will be presented below). It is easier to argue that the provision is now being applied to a much wider range of cases than ever before. It is worth highlighting a few more cases where the ambit of Article 3, at least on its surface, appears to have been expanded. In the recent case of *Muršić v Croatia*⁶² the Grand Chamber of the European Court found that there had been a breach of Article 3 amounting to inhuman and degrading treatment when the application was confined in a cell measuring 2.62 square metres for 27 consecutive days. Although the Court in this case did not find that confinement in less than three square metres would always amount to a breach of Article 3 ‘the starting point for the Court’s assessment is a strong presumption of a violation of Article 3.’⁶³ This case *prima facie* appears to strengthen the Court’s view on conditions of detention, proscriptively delimiting the amount of space a prisoner should have. The Court has appeared to expand the remit of Article 3 so that passive smoking in detention could amount to a breach of Article 3. In *Florea v Romania*⁶⁴ it was held that the applicant,

Reply to Steven Greer’ (2017) 17 *Human Rights Law Review* 681; N Mavronicola ‘Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer’ (2017) 17 *Human Rights Law Review* 479.

⁵² *Tyrer v UK* (1978) 2 EHRR 1.

⁵³ *Costello-Roberts v UK* (1993) 19 EHRR 112.

⁵⁴ There are a considerable number of cases concerning conditions of detention, but for some examples see: *Khlaifia and others v Italy*, Application no. 16483/12, Judgment of 15 December 2016; *Kalashnikov v Russia* (2002) 36 EHRR 587.

⁵⁵ *Umar Karatepe v Turkey* (2010), Application no 20502/05, Judgment of 12 October 2010.

⁵⁶ *Hellig v Germany* (2011), Application no 20999/05, Judgment of 7 July 2011.

⁵⁷ *Erdogan Yagiz v Turkey* (2007) Application no. 27473/02, Judgment of 3 June 2007.

⁵⁸ N Graffin, ‘Gäffen v Germany: The Use of Threats and the Punishment of Those Who Ill-treat During Police Questioning: A Reply to Steven Greer’.

⁵⁹ *Yazgul Yilmaz v Turkey*, Application no 36369/06, Judgment of 1 February 2011.

⁶⁰ See N Graffin, ‘Gäffen v Germany: The Use of Threats and the Punishment of Those Who Ill-treat During Police Questioning: A Reply to Steven Greer’.

⁶¹ S Grassian, ‘Psychiatric Effects of Solitary Confinement’ (2006) 22 *Washington University Journal of Law and Policy* 325, 328.

⁶² *Muršić v Croatia* (2016) Application no. 7334/13, Judgment of 20 October 2016.

⁶³ *Ibid*, para 126.

⁶⁴ *Florea v Romania*, Application no 37186/03, Judgment of 14 September 2010.

who was suffering from chronic hepatitis and arterial hypertension, was subjected to a breach of Article 3 as a result of being subjected to passive smoking.

6. Human Dignity in Article 3

In the last 20 years the Court has been increasingly willing to utilise the concept of human dignity to expand the remit of cases which fall within the ambit of degradation (and Article 3 in a more general sense).⁶⁵ We can see 'human dignity' used in early cases concerning degradation such as the *East Africans* case⁶⁶ where the Commission considered that the 'general purpose of the provision is to prevent interferences with the dignity of man of a particularly serious nature',⁶⁷ but it seems to be used increasingly by the Court. We can see human dignity used in the case of *Kudła v Poland*⁶⁸ where the Court held:

[T]he State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.⁶⁹

In *Yankov v Bulgaria*⁷⁰ the Court stated that the forced shaving of someone's hair could amount to degrading treatment, whilst drawing on the concept of human dignity:

The Court thus considers that the forced shaving off of detainees' hair is in principle an act which may have the effect of diminishing their human dignity or may arouse in them feelings of inferiority capable of humiliating and debasing them. Whether or not the minimum threshold of severity is reached and, consequently, whether or not the treatment complained of constitutes degrading treatment contrary to Article 3 of the Convention will depend on the particular facts of the case, including the victim's personal circumstances, the context in which the impugned act was carried out and its aim.⁷¹

In the case of *Svinarenko and Slyadnev v Russia*,⁷² where the Grand Chamber of the Court found that the practice of keeping prisoners in metal cages during court hearings amounted to degrading treatment, a violation of human dignity is cited for the finding of a breach. In another case which appears to expand the remit of Article 3 - *Slyusarev v Russia*⁷³ - the applicant alleged that taking his glasses after his arrest, then making the detainee wait five months before returning them to him, and another two months for new glasses, amounted to degrading treatment. The Court considered that if the glasses had been returned to the applicant quickly no issue under Article 3 would have arisen,⁷⁴ but:

[U]nder Article 3 of the Convention the States must ensure that a person is detained in conditions which are compatible with respect for his *human dignity*, and that, given the practical demands of imprisonment, his health and well-

⁶⁵ For further reading: N Mavronicola (2016) 'Bouyid v Belgium: The 'Minimum Level of Severity' and Human Dignity's Role in Article 3 ECHR' (2017) 1 *Cyprus Human Rights Law Review* 2, 198-212.

⁶⁶ *East Africans Case v UK*, Comm Rep, 14 Dec 1973.

⁶⁷ *Ibid*, para 189.

⁶⁸ *Kudła v Poland* (2000) 35 EHRR 198.

⁶⁹ *Ibid*, para 94.

⁷⁰ *Yankov v Bulgaria* (2003) 40 EHRR 854.

⁷¹ *Ibid*, para 114.

⁷² *Svinarenko and Slyadnev v Russia* (Applications nos 32541/08 and 43441/08), Judgment of 17 July 2014 [Grand Chamber].

⁷³ *Slyusarev v Russia* (2010), Application no. 60333/00, Judgment of 20 April 2010.

⁷⁴ *Ibid*, para 42.

being are adequately secured by, among other things, providing him with the requisite medical assistance. Taking the applicant's glasses could not be explained in terms of the "practical demands of imprisonment", and, even more so, was unlawful in domestic terms....⁷⁵

In *Bouyid v Belgium*⁷⁶ the Grand Chamber of the European Court was called to consider whether single slaps inflicted on a minor and an adult in police custody amounted to a breach of Article 3. The Grand Chamber, overruling the Chamber judgment in this case, ruled by 14 votes to 3 that there had been a substantive violation of Article 3. The Grand Chamber unanimously found that there had also been a breach of the investigative duty under Article 3. The case of *Bouyid* was particularly interesting for the Court, as much of the disagreement within the Grand Chamber lay in the understanding of the 'minimum level of severity' required for ill-treatment to be considered to fall within the threshold of Article 3. The Chamber in this case had considered that:

Even supposing that the slapping took place, in both cases it was an isolated slap inflicted thoughtlessly by a police officer who was exasperated by the applicants' disrespectful or provocative conduct, without seeking to make them confess. Moreover, there was apparently an atmosphere of tension between the members of the applicants' family and police officers in their neighbourhood. In those circumstances, even though one of the applicants was only 17 at the time and whilst it is comprehensible that, if the events really took place as the applicants described, they must have felt deep resentment, the Court cannot ignore the fact that these were one-off occurrences in a situation of nervous tension and without any serious or long-term effect. It takes the view that acts of this type, though unacceptable, cannot be regarded as generating a sufficient degree of humiliation or debasement for a breach of Article 3 of the Convention to be established. In other words, in any event, the above-mentioned threshold of severity has not been reached in the present case, such that no question of a violation of that provision, under either its substantive or its procedural head, arises.⁷⁷

The Grand Chamber overturned this decision, placing emphasis on the concept of human dignity and finding that there was a breach of Article 3 amounting to degrading treatment. It suggested, again, that 'respect for human dignity forms part of the very essence of the Convention'.⁷⁸ Whereas some lawyers caution against the use of dignity in underpinning human rights judgments because of its intangibility,⁷⁹ Webster places human dignity as a key component in our understanding of degradation and argues that 'respect for human dignity is a fundamental value that guides interpretation at different levels of abstraction'.⁸⁰ The term is useful due to its aspirational nature. It can provide a benchmark, however intangible that might be, for the betterment of the protection of humans by other humans, because people intuitively render a meaning to it. In addition, as will be argued below, all language has its limitations and if we are to pick apart 'dignity' as a concept, we can pick apart the inadequacies of all human rights language.

7. The Limitations of Language in Encapsulating Article 3

For this section, this chapter will focus on the concepts of degradation (and by inference dignity) for the purposes of illustration. Webster outlines various 'benchmarks' which derive from the definitions provided by the European Court as encompassing what degradation means: 'feelings of fear, anguish, inferiority capable of causing humiliation or debasement; the

⁷⁵ *Ibid*, para 43 [emphasis added].

⁷⁶ *Bouyid v Belgium*, Application no 23380/09, Judgment of 28 September 2015.

⁷⁷ *Bouyid v Belgium* (Application no 23380/09), Judgment of 21 November 2013 [Fifth Section].

⁷⁸ *Bouyid*, para 89.

⁷⁹ See, for example: R. O'Connell 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6(2) *International Journal of Constitutional Law* 267, 267-286.

⁸⁰ E. Webster, *Dignity, Degrading Treatment and Torture in Human Rights Law* (Routledge 2018) 48.

breaking of one's will or conscience; and suffering, contempt or lack of respect for one's personality'.⁸¹ These are found in the many definitions of degradation the Court uses; we might add human dignity to the list. Webster argues that degradation is a sort of 'outline' into which the benchmarks fit.⁸² Elsewhere, Webster points out the epistemological dimension of the provision, outlining that the 'every day uses of terms may accord within one each other, or they may diverge. Interpretation involves deciding which of the semantic meanings constitute the proper legal meaning'.⁸³ However, finding proper legal meaning may be an impossible task. This could be why the Court has employed so many benchmarks – to cast the net wide and capture within the many definitions, different harms, effects and wrongs which we want Article 3 to prohibit. Often these benchmarks are unable to get to the crux of why a form of ill-treatment is acceptable or not, because they cannot define ill-treatment while at the same time set parameters for the provision. For example, in relation to the benchmark of humiliation, it could be argued that not all grossly humiliating treatment will be something that leads to an Article 3 breach⁸⁴ – the imposition of a standard prison sentence could be grossly humiliating for many but, of course, this does not mean it is a human rights violation. We can see other examples of this, where the Court uses definitions which although might be evident in the form of ill-treatment present, could be apparent in a seemingly acceptable form of treatment.

A textual analysis to deciphering what amounts to a breach of Article 3, and what does not, will never be enough – language always has limitations in its signifying processes. The benchmarks used by the Court will never fully cover what the Article seeks to protect, whilst delimiting the provision at the same time. The Court needs to be cognisant (as I believe it generally is) of wider moral and policy arguments when considering what breaches the provision, and even justifications for some forms of harms (e.g. solitary confinement) being permitted. How we decipher what degradation is can rather be achieved by looking at the cases as they are practised. As argued by Wittgenstein, recognising the limitations of language, 'for a large class of cases of the employment of the word 'meaning'—though not for all—this word can be explained in this way: the meaning of a word is its use in the language',⁸⁵ or in other words, the meaning of the word is in its use.

Language is, of course, still of upmost value. It provides signals to effects, harms or emotions, for example, which as humans we understand as embodying specific qualities, however differently these might be felt. Some words may also be more intangible than others. 'Dignity', for example, is a more ethereal concept than 'humiliation', an emotion we might experience many times within our lifetime and can identify more readily through its mental and physical effects. Nevertheless, this is not to say 'dignity' is a useless concept for the court to hinge its decisions upon, because it accords a status to individuals, creating an inviolable bubble around them against infringement from certain harms. It has meaning, however intangible that might be, but more importantly *use*.

7. Limits, Evolutions, and Potentialities of Article 3 with Respect to Migrants

Article 3, as demonstrated so far in this article, has been used in a wide-ranging array of cases. In relation to migration, Article 3 has been deployed in numerous ways to prevent harm to individuals. For example, it has been used to prevent extradition of migrants where they might be subjected to a breach of Article 3 on being returned to their home country. In the leading case of *Soering v UK*⁸⁶, which dates to 1989, the applicant was a German national who had

⁸¹ *Ibid*, 63.

⁸² *Ibid*.

⁸³ *Ibid*, 48.

⁸⁴ J. Vorhaus 'On Degradation-Part One: Article 3 of the European Convention on Human Rights' (2002) 31 *Comm. L. World Rev* 374.

⁸⁵ L. Wittgenstein, *Philosophical Investigations (PI)*, (P.M.S. Hacker and Joachim Schulte eds. and trs. 4th edn, Wiley-Blackwell 2009) 43.

⁸⁶ *Soering v United Kingdom* (1989) 11 EHRR 439 PC.

moved to the United States. It was alleged that the applicant and his girlfriend had co-conspired to murder his girlfriend's parents. The two then fled to Europe, where they were arrested in England. The United States requested extradition of the pair, but the applicant argued there was a risk of the death penalty being imposed which could breach Article 3. The Court considered that it was not the risk of the death penalty which breached Article 3, but 'death row phenomenon', referring to the emotional distress facing prisoners on death row. Consideration was given to the applicant's young age and the mental state he was in at the time of the offence. This was the first time an individual was refused extradition based on the potential for a breach of Article 3.

In *M.S.S. v Belgium and Greece*,⁸⁷ Belgium was found to be in breach of Article 3 when, under the EU Dublin Regulation, it removed an asylum claimant to Greece where there was a real risk that the living conditions the person would be made to live under would breach Article 3. This case highlighted that the Court would be willing to refuse extradition to a country which was a member of the Council of Europe, and signatory to the ECHR. In the case of *Hirsi Jamaa and others v Italy*⁸⁸ the applicants challenged Italy's push-back policy of intercepting asylum claimants at sea and returning them to Libya. This was not a new phenomenon, but this case allowed the Court to make a judgment on its compliance with relevant human rights standards. In respect of Article 3, the Court found a breach of Article 3 because the applicants were exposed to the risk of repatriation to Eritrea and Somalia.

The Court has sometimes changed previous decisions to lead to the better protection of individuals. This can be seen in a series of cases involving challenges to extradition based on ill-health. In *D v UK*⁸⁹ the applicant, who had AIDS, was ordered to be returned to St Kitts for committing a criminal offence. The European Court held here that the 'abrupt withdrawal' of the applicant to a state where he would not have access to adequate medical treatment, or family or support networks, could amount to inhuman treatment. The Court held here that 'very exceptional circumstances' compelled them to make this decision. In *N v UK*⁹⁰ it was considered that a Ugandan citizen with HIV/AIDS could be returned to their home country, even though the medication she required to keep her alive beyond one year was expensive in Uganda and was not available in her hometown. However, in the 2016 of *Paposhvili v Belgium*⁹¹ the Grand Chamber reshaped its case law on Article 3. The applicant was seriously ill and expulsion to Georgia would put him at risk of inhuman treatment and an earlier death. The Grand Chamber lowered the threshold of 'very exceptional circumstances', which had appeared to require an imminent risk of dying. The Court noted that the applicant was not in an imminent danger of dying but 'very exceptional circumstances' should include instances where a person 'would face a real risk, on the account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction of life expectancy'.⁹²

Article 3, however, has its limitations in protecting individuals from harm, some of these arising from the Article itself, and others relating to how human rights law operates. There is a carefully crafted body of jurisprudence which delimits the scope of the Article.⁹³ Whereas all conduct falling within its ambit is absolutely prohibited, harmful conduct can take place which is not deemed to reach the threshold of the provision and therefore is permitted under human rights

⁸⁷ *MSS v Belgium and Greece* (2011) 53 EHRR 28.

⁸⁸ *Hirsi Jamaa and others v Italy*, Application no 27765/09, Judgment of 23 February 2012.

⁸⁹ *D v UK* (1997) 24 EHRR 423.

⁹⁰ *N v United Kingdom* (2008) Application no 26565/05, Judgment of 27 May 2008.

⁹¹ *Paposhvili v Belgium* (2016) Application no 41738/10, Judgment of 13 December 2016.

⁹² *Ibid*, para 186.

⁹³ C Harvey 'The International Protection of Refugees and Asylum Seekers: The Role of Article 3 of the European Convention on Human Rights' in A Abass and F Ippolito, *Regional Approaches to the Protection of Asylum Seekers: an International Legal Perspective* (Ashgate 2016).

law. For example, we can see the Court set parameters on the protection of individuals in the case of *Rahimi v Greece*,⁹⁴ where the Court found a violation of Article 3 ECHR regarding the detention of foreign children, but not for adults. The Court pointed out the applicant's 'extreme vulnerability' as an unaccompanied minor, yet the camp was noted to be 'filthy beyond description' and 'a health hazard for staff and detainees alike', due to overcrowding and extremely poor sanitary conditions. In cases where harms have been committed, but do not reach the threshold of Article 3, it is very regrettable that defendant states are, in a sense, exonerated – this is a further drawback to the operation of the Article.

Furthermore, given the scale of human rights issues facing migrants and refugees, we can say with certainty that human rights law has failed them. In a wider sense, migrants face daily human rights issues and abuses in detention, and in the journeys that they make. Given that human rights law is supposed to protect the most vulnerable, this illustrates its clear failure as a body of law. When the Court has got involved, it has fallen short. This was no more evident when the ECtHR were asked to allow migrants who had been travelling from Libya but had been rescued by the search and rescue vessel SeaWatch 3, to disembark in Italy. At that time there were serious concerns for the health of the migrants, some of whom including minors.⁹⁵ In its decision,⁹⁶ the ECtHR did not grant the applicant's requests to be disembarked, but rather asked Italy 'to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary' and to provide legal guardianship for minors. Therefore, while it was clear that the migrants needed to disembark on safe and dry land, that they could not stay at sea continually and Italy was where they were seeking safe refuge, the Court upheld the state's request to prevent disembarkation. Later the captain of SeaWatch 3 was exonerated after she was arrested for disembarking the ship at Lampedusa.⁹⁷

From an operational perspective, Article 3 is also limited in its ability to protect individuals by how it is applied by the Court. Traditionally Article 3 has operated on a largely 'declaratory' basis where breaches of the Article are found, published in the Court's reports, and States are named and shamed into compliance.⁹⁸ Although compensation is awarded under Article 41 of the Convention, monies awarded are designed to cover pecuniary and non-pecuniary damages, therefore the amounts awarded are unlikely to have any deterrent effect on the conduct of States.⁹⁹ The Court can also only operate when cases, or more recently, advisory opinions, are brought to it, although it should be noted that positive obligations arising from some of the Articles provide means through which some issues can be addressed on a less reactive basis. For example, it has been established that there is a duty to investigate under the procedural head of Article 3, which creates positive obligations for the state to create

⁹⁴ *Rahimi v Greece* (2011) Application no 8687/08, Judgment of 5 July 2011.

⁹⁵ Chico Harlan 'Sea-Watch 3: Refugee Ship Defies Italy's Far-right Leader Matteo Salvini by Taking Rescued Migrants to Port' *The Independent* (London, 27 June 2019).

⁹⁶ This is unreported, but the press release can be found here: Registrar of the ECtHR, 'ECHR Grants an Interim Measure in Case Concerning the SeaWatch 3 Vessel' ECHR 043 (2019), (ECtHR 29 January 2019) <<https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-6315038-8248463&filename=ECHR%20grants%20an%20interim%20measure%20in%20case%20concerning%20SeaWatch%203%20vessel.pdf>>.

⁹⁷ Zamira Rahim, 'Italian Court Frees Captain of Sea-Watch Refugee Boat in Blow to Matteo Salvini', *The Independent*, (London, 2 July 2019).

⁹⁸ B Çalı and A Wyss, 'Why do Democracies Comply with Human Rights Judgments?' A Comparative Analysis of the UK, Ireland and Germany' (Part of the United Kingdom Economic and Social Research Council project on the 'Legitimacy and Authority of Supranational Human Rights Courts: A Comparative Analysis of the European Court of Human Rights' Grant No: RES-061-25-0029); T Keenan 'Mobilising Shame' (2004) 103 *South Atlantic Quarterly* 2-3.

⁹⁹ For further discussion, see: N Graffin, 'The Legal Consequences of Ill-treating Detainees Held for Police Questioning in Breach of Article 3 ECHR' (2014) 20 *European Journal of Current Legal Issues* 2.

sanctions and provide mechanisms through which individuals can be prosecuted with the view to the potential for punishment.¹⁰⁰

Human rights law also has the potential, as many critical legal scholars point out, of crowding out other means of addressing harms, whether these might be political methods or otherwise. David Kennedy, for example, argues that human rights law occupies too large a space in advancing freedoms, to the detriment of other emancipatory strategies.¹⁰¹ Sometimes other strategies will be much more effective. The Court is cognisant of its limitations. For example, in the case of *J.R. v Greece*¹⁰² it noted in mitigation to finding no violation to Article 3 (in addition to a lack of evidence that the conditions of detention were poor, as well as the brevity of the detention) the exceptional and sharp increase in migratory flows in Greece which had created organisational, logistical and structural difficulties for the State. Under these conditions, it might be inferred, finding a breach of Article 3 was unlikely to have any effect on the state being able to respond to improving conditions of detention. Therefore, other strategies were required.

One relatively recent, and potentially radical, addition to the armoury of the European Court is the pilot judgment procedure. This procedure was developed as a technique of identifying structural problems underlying repetitive cases against many countries and imposing an obligation on states to address those problems. If the Court receives several applications with the same root cause it can select one of these for a pilot judgment to seek to remedy the underlying issue.¹⁰³ The process has been codified in Rule 61 of the Rules of the Court,¹⁰⁴ and has been used to address issues with conditions of inhuman and degrading conditions of detention in *Ananyev and others v Russia*¹⁰⁵ and *Torreggiani and others v Italy*.¹⁰⁶ Once a pilot judgment decision has been made, where a breach has been found, it is up to the Committee of Ministers to oversee the execution of the judgment – should that mean supervising the amelioration of conditions of detention, for example, or a change in the law. Therefore, the pilot judgment procedure can be used as a means of creating obligations to improve human rights.

In respect to the protection of migrants, a pilot judgment could be made aimed at improving conditions in detention camps, such as Moria, in Lesbos in Greece. However, as outlined previously, the ability of the Court to respond to harms rests on cases being brought before it – in respect of the pilot judgment procedure it rests on many cases being brought by different individuals – and it rests on the willingness and ability of the State in question to comply with the judgment. Therefore, while the procedure has potentialities for the protection of migrants, it carries with it many of the limitations of the Court itself. Nevertheless, there is the potential that the pilot judgment procedure could be utilised to more effective means. This is an area where the Court could attempt to find more radical and innovative ways of protecting people from harm.

9. Conclusion

In the 50 years since the *Greek* case Article 3 of the European Convention of Human Rights has evolved in a variety of ways. Its remit has expanded, and it is now being utilised in an increasingly wide range of cases. It has also set its parameters, giving us some guidance as to the threshold between acceptable and unacceptable conduct and delimiting cases where it

¹⁰⁰ *Assenov v Bulgaria*, (1999) 28 EHRR 651, para 102.

¹⁰¹ D Kennedy 'The International Human Rights Movement: Part of the Problem?' (2002) *Harvard Human Rights Journal* 15, 101–126.

¹⁰² *J.R. and others v Greece* (application no. 22696/16), Judgment of 25 January 2018, para 138.

¹⁰³ Council of Europe, *Factsheet: Pilot Judgments* (Council of Europe 2019).

¹⁰⁴ Council of Europe, *Rules of Court* (Council of Europe 2019), Rule 61.

¹⁰⁵ *Ananyev and others v Russia* (2012) 55 EHRR 18.

¹⁰⁶ *Torreggiani and others v Italy* (2013) ECHR 10.

can be applied. The Court has also provided examples of forms of harmful conduct which might be acceptable under Article 3, for instance, solitary confinement in a regulated environment. The European Court is now able to deploy a potentially radical new power, through the pilot procedure, which can enable the supervision of changes to systemic issues. This could allow the Court to supervise the amelioration of the protection of individuals, such as the improvement of conditions of detention for migrants.

This chapter has provided a snapshot of 50 years of judgments under the provision. It has traced some of its developments and its limitations, including how the concept of 'dignity' is now being used by the Court. It has also discussed the different definitions under the provision, regarding torture, inhumanity and degradation, seeking to argue that debates concerning how harms are defined under the article will always be inadequate. These judgments have undoubtedly led to the improvement of human rights standards. Nevertheless, torture and inhuman and degrading treatment and punishment are still widespread in the Council of Europe, particularly in the Russian Federation and Turkey. Europe faces an uncertain future as the human rights of individuals are under increasing attack – particularly those of migrants fleeing war and persecution. This chapter finishes in the hope that Article 3 can be continued to be deployed in new and more innovative ways to prevent harms committed against the person in the future.